

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 21-0260

SHAUN GETTY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ACADEMI)	
)	DATE ISSUED: 09/15/2021
and)	
)	
STARR INDEMNITY & LIABILITY)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order Granting, in Part, Motion for Attorney Fees on Remand of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Howard S. Grossman and Callie J. Fixelle (Grossman Attorneys at Law),
Boca Raton, Florida, for Claimant.

Before: BUZZARD, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Lauren C. Boucher's Order Granting, in Part, Motion for Attorney Fees on Remand (Order) (2018-LDA-00035) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (DBA). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, based

on an abuse of discretion or not in accordance with applicable law. *See, e.g., Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

This fee petition is before the Benefits Review Board for the second time. On December 21, 2018, Claimant's counsel filed a petition for an attorney's fee for work performed before the Office of Administrative Law Judges.¹ Counsel requested \$82,863.61, representing 63.2 hours of lead attorney time at an hourly rate of \$450 (Grossman), 4.9 hours of associate attorney time at an hourly rate of \$275 (Thaler), 191.85 hours of associate attorney time at an hourly rate of \$225 (Fixelle), 16.85 hours of paralegal time at an hourly rate of \$150, and \$7,382.36 in costs. Employer filed objections to the fee petition, challenging the hourly rates, specific time entries, and costs. Claimant's counsel filed a reply to Employer's objections and sought a supplemental fee of \$2,892.64 for preparing it. Employer filed a sur-reply.

In her Order, the ALJ reduced the hourly rates requested by counsel and reduced or disallowed certain itemized entries and costs. She awarded Claimant's counsel a fee of \$64,942.12, representing \$60,474.50 for legal services and \$4,467.62 in costs, payable by Employer. Claimant's counsel appealed the ALJ's award of an attorney's fee and costs.

A majority of the Board's panel vacated the ALJ's hourly rate determinations because the rationale could not be discerned, nor could the impact of her error of law in considering the complexity of the case in her hourly rate findings.² *Getty v. Academi*, BRB No. 19-0359, slip op. at 3-6 (Jul. 30, 2020) (unpub.) (Buzzard, J., concurring in part and dissenting in part.);³ *see generally Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). The Board remanded the case to the ALJ for further consideration and explanation of the hourly rate awarded to Claimant's counsel.

¹ On November 16, 2018, the ALJ issued an Order Approving Joint Stipulations and Awarding Benefits.

² The ALJ awarded hourly rates of \$400, \$245, and \$200, for Grossman, Thaler, and Fixelle, respectively. Orig. Fee Order at 7.

³ The Board also held Employer's evidence was insufficient to establish the availability and competency of local counsel, remanded the case for the ALJ to reconsider counsel's entitlement to a fee for travel time from Florida to New York, deposition time, and costs associated with that travel, and rejected Claimant's counsel's assertion that the ALJ failed to address the supplemental fee petition. *Getty*, slip op. at 8-9.

On remand, the ALJ acknowledged the parties' agreement that South Florida is the relevant market. However, she reduced the requested hourly rates for Grossman from \$450 to \$440, for Thaler from \$275 to \$271.23, and for Fixelle from \$225 to \$212.75. She rejected counsel's request for a fee enhancement to account for delay and inflation; allowed travel time and costs for Claimant's counsel's in-person attendance at the depositions; and approved a supplemental fee for counsel's work on remand. In total, the ALJ awarded Claimant's counsel a fee of \$82,788.53, representing \$76,839.85 in attorneys' fees and \$5,948.68 in costs.

On appeal, Claimant's counsel challenges the hourly rates awarded to his firm, asserting the ALJ erred in denying a fee enhancement to account for inflation. He also contends she erred in awarding his fee based on the median rates instead of the third-quartile rates. Employer did not respond to counsel's appeal.

In her decision, the ALJ rejected the suggested rates from each party for counsel's work. She relied on data Claimant's counsel submitted from the 2016 Real Rate Report showing the hourly rate for partners in Miami, Florida, who have practiced for more than 21 years, and the 2014 Real Rate Report for partners practicing labor and employment law in Miami. Order at 6. The ALJ found the 2016 Real Rate Report showing applicable hourly rates between \$322 and \$563 does not account for practice areas, whereas the 2014 Real Rate Report shows applicable hourly rates between \$195 and \$350 for experienced attorneys practicing labor and employment law. She determined, "despite his extensive experience," counsel's hourly rate should be in line with the median experience-based rate in the 2016 Real Rate Report of \$440, rather than the third quartile rate, because the report does not account for the differing hourly rates by practice area. *Id.* at 6-7.

Counsel contends the evidence he submitted shows his entitlement to an hourly rate closer to the third quartile rate of \$562 in the 2016 Real Rate Report for Miami attorneys with over 21 years' experience. We reject counsel's argument. In his initial fee petition and his supplemental petition, he requested an hourly rate of \$450. Fee Petition at 4; Supplemental Fee Petition at 5. Accordingly, we decline to address his contention that he is entitled to a higher hourly rate than he requested before the ALJ, as he raised it for the first time on appeal. *Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT), *aff'g in part and vacating on other grounds D.V. [Van Skike] v. Cenex Harvest States Coop.*, 41 BRBS 84 (2007); *see also Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009). Additionally, it is within the ALJ's discretion to determine the appropriate percentile when assessing hourly rates from locality charts so long as she does not rely on improper factors. *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021). Her explanation for basing counsel's fee on median

rates is reasonable.⁴ While Claimant was not awarded rates in the upper quartile of all experienced attorneys in Miami, regardless of practice area, as set forth in the 2016 report, the hourly rate of \$440 placed him well above the top range for experienced lawyers identified in the 2014 report, in a practice area comparable to counsel's – labor and employment law.

Claimant's counsel also avers the ALJ erred by failing to account for inflation to augment the awarded hourly rates by the increase in the Consumer Price Index (CPI) for South Florida from 2016 to 2020. The ALJ rejected counsel's request for a fee enhancement. Order at 9. She found the delay from when most services were rendered between 2017 and 2019 is not substantial, and the most recent market evidence the parties submitted was from 2016. *Id.*

The issue of delay concerns the lapse in time between the performance of the legal services and the award of a fee for those services. *Missouri v. Jenkins*, 491 U.S. 274 (1989). In this case, counsel's services were rendered between October 2017 and December 2018. Fee Petition at pp. 17-42. The ALJ issued her initial fee award in April 2019. As the maximum delay in this case is fewer than two years, the ALJ reasonably declined to enhance the award for delay. *See Christensen v. Stevedoring Services of Am.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009) (two-year delay in payment is not long enough to merit a fee enhancement). Moreover, counsel cannot recover for delay due to appeals of the fee award. *See Anderson v. Director, OWCP*, 91 F.3d 1322, 1325 n.3, 30 BRBS 67, 69 n.3(CRT) (9th Cir. 1996); *Hobbs v. Director, OWCP*, 820 F.2d 1528, 1531 (9th Cir. 1987). The ALJ's finding that a delay enhancement is not warranted in this case is supported by substantial evidence and is in accordance with law. *Compare Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT), *with Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table). Therefore, we affirm her denial of an enhanced fee.

⁴ We affirm the basis of the hourly rates awarded to Grossman's co-counsel as unchallenged on appeal. *See generally Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Accordingly, we affirm the ALJ's Order Granting, in Part, Motion for Attorney Fees on Remand.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge